

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 46300 of 2023

Applicant :- Gaurav Gupta

Opposite Party :- State of U.P.

Counsel for Applicant :- Pawan Kumar Shukla, Maneesh Tiwari

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

Heard Mr. Pawan Kumar Shukla, the learned counsel for applicant, the learned A.G.A. for State and Mr. Mukesh Joshi, Advocate, who has put in appearance on behalf of first informant by filing his *vakalatanama* in Court today, which is taken on record.

Perused the record.

This application for bail has been filed by applicant Gaurav Gupta seeking his enlargement on bail in Case Crime No. 143 of 2023, under Sections 302, 506, 34 IPC, P.S. Pakbara, District Moradabad, during the pendency of trial.

Record shows that in respect of an incident, which is alleged to have occurred on 22.4.2023, a delayed F.I.R. dated 23.4.2023 was lodged by first informant Firoz Alam alias Babloo (brother of the deceased) and was registered as Case Crime No. 143 of 2023, under Section 302 IPC, P.S. Pakbara, District Moradabad. In the aforesaid F.I.R., applicant Gaurav Gupta has been nominated as solitary named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that deceased namely Sayab Alam (younger brother of the first informant) last went in the company of named accused (applicant herein) on 22.4.2023 at 830 p.m.. However, thereafter, the whereabouts of the brother of the first informant could not be found. Ultimately, the dead body of the deceased i.e. the brother of the first informant was found in the grave yard.

After above mentioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of the concerned crime number in terms of Chapter XII Cr. P. C. The inquest (*panchayatnama*) of the body of the deceased was conducted. In

the opinion of witnesses of inquest (*panch* witnesses), neither the nature of death of the deceased nor cause of death of deceased could be categorized/specified. Thereafter, the post mortem of the body of the deceased was conducted. In the opinion of Autopsy Surgeon, who conducted autopsy of the dead body of the deceased, the cause of death of deceased was asphyxia as a result of ante mortem strangulation. The Autopsy Surgeon opined found following ante mortem injuries on the body of the deceased:-

1. A Ligature mark of size 30 cm x 2.5 cm all around the neck, horizontally, present which 6.0 cm below Rt. ear, 6.0 cm below Chin, 6.0 cm below Lt. ear.

Base of mark is reddish brown & soft.

On dissection-Subcutaneous tissue under ligature mark is ecchymosed.

2. Lacerated wound 1 cm x 0.5 cm on scalp Lt. side of head 5 cm above Lt. ear which is scalp deep

3. Multiple abraded contusion 17x 8 cm on both side of front of head.

4. Contusion 5 cm x 3 cm. Lt. eye.

6. Multiple Abraded contusion 12 cm x 7 cm on Lt. side of face.

Lt. (2) Incisor of Lt. side of upper jaw & one (1) canine of Lt. side of upper jaw are broken blood oozing present clotted type Lt. (2) Incisor of Lt. side lower jaw are broken clotted blood present.

During course of investigation, Investigating Officer examined three witnesses namely Fioroz Alam, Shakir and Sahanawaj. As per the statements of aforesaid witnesses they are alleged to be present in the grave yard at the time of occurrence and they also witnessed the occurrence. On the basis of above and other material collected by the Investigating Officer, he came to the conclusion that complicity of present applicant is fully established in the crime in question. He, accordingly, submitted the charge sheet dated 17.6.2023 against applicant Gaurav Gupta and Lucky alias Faizan, whereby aforesaid two persons have been charge sheeted under Sections 302 and 506 IPC.

Learned counsel for applicant submits that though applicant is a named and charge sheeted accused, yet he is liable to be enlarged on bail. During the course of investigation, following adverse circumstances have emerged against applicant:-

(a) The deceased is said to be last seen in the company of the applicant. It is the prosecution version also.

(b) The complicity of the applicant has emerged in the statement of three witnesses mentioned above, who are said to be eye witnesses.

According to the learned counsel for applicant, no conviction can be maintained on the basis of last seen, by virtue of law laid down by the Supreme Court in the cases of **Jabir Vs. State of Uttarakhand, 2023 SCC OnLine SC 32** and **Jaswant Gir Vs. State of Punjab, (2005) 12 SCC 438**.

It is then contended that the statements of the three witnesses mentioned above in whose statements, complicity of applicant has emerged in the crime in question and further the said witnesses alleged themselves to be eyewitnesses of the occurrence is doubtful, in view of the fact that the alleged disclosure has been made by the said witnesses after two months of the occurrence. This suspicious circumstance remains unexplained upto this stage.

According to the learned counsel for applicant, neither any recovery has been made from the applicant nor any strong motive has emerged against the applicant to commit the crime in question. Upto this stage, it cannot be inferred that applicant had any animus to commit the crime in question.

Even otherwise, applicant is a man of clean antecedents inasmuch as he has no criminal history to his credit except the present one. Applicant is in jail since 24.04.2023. As such, he has undergone more than six months of incarceration. The charge sheet having been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant now stands crystallized. However, no such circumstance has emerged necessitating the custodial arrest of the applicant during the course of trial. On the above premise, it is thus urged that applicant is liable to be enlarged on bail. In case, applicant is enlarged on bail, he shall not misuse the liberty of bail and shall co-operate with the trial.

Per contra, the learned A.G.A. and the learned counsel representing first informant have opposed the prayer for bail. They submit that since the applicant is a charge sheeted accused, therefore, he does not deserve any indulgence by this Court. The complicity of applicant in the crime in question is fully established as per the statements of the three witnesses, who are eyewitnesses of the occurrence. Since the present case is a case of direct evidence, therefore motive and animus have no role to play. It is thus contended that no sympathy be shown by this Court in favour of applicant. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant with

reference to the record at this stage.

Having heard the learned counsel for applicant, the learned A.G.A. for state, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made and coupled with the fact that as per the prosecution story, the theory of last seen has been traced against the applicant by virtue of the law laid down by Supreme Court as noted above, no conviction can be maintained simply on the basis of last seen, the credibility and reliability of the three witnesses named above in whose statements, the complicity of applicant has emerged in the crime in question is doubtful, inasmuch as the said statement was recorded after two months of the occurrence, the silence on the part of aforementioned witnesses for a period of two months is by itself a suspicious circumstance, which could not be explained by the learned A.G.A. or the learned counsel representing first informant, the clean antecedents of applicant, the period of incarceration undergone, the police report in terms of Section 173 (2) Cr. P. C. has already been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant now stands crystallized, yet the learned A.G.A. and the learned counsel for first informant could point out any such circumstance necessitating the custodial arrest of the applicant during the course of trial, the judgements of the Supreme Court in the cases of **Jabir Vs. State of Uttarakhand, (supra)** and **Jaswant Gir Vs. State of Punjab, (supra)**, therefore, irrespective of objections raised by the learned A.G.A. and the learned counsel representing first informant in opposition to the present application for bail, but without making any comment on the merits of the case, the applicant has made out a case for bail.

Accordingly, the bail application is **allowed**.

Let the applicant **Gaurav Gupta** involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on

each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C..

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(iv) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The trial court may make all possible efforts/endeavour and try to conclude the trial within a period of one year after the release of the applicant.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his bail so granted by this court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 2.11.2023
HSM